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No. 95-813

In the Supreme Court of the United States

OCTOBER TERM, 1995

BRAD BENNETT, et al., Petitioners

v.

MARVIN PLENERT, et al., Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN FARM BUREAU FEDERATION, CALIFORNIA FARM BUREAU, IDAHO FARM BUREAU, TEXAS FARM BUREAU, AND OREGON FARM BUREAU AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether private landowners are within the "zone of interests" of the Endangered Species Act and thus have standing to challenge the government's failure to adhere to that statute's enforcement standards and procedures.

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INTERESTS OF THE AMICI CURIAE*

The American Farm Bureau Federation ("AFBF") is a voluntary general farm organization organized in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois. AFBF was founded to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF has member organizations in all 50 states and Puerto Rico representing more than 4.4 million members and their families. Amici California, Idaho, Oregon, and Texas Farm Bureaus are constituent members of AFBF, representing the interests of farmers and ranchers in their respective states.[1]

The AFBF and state Farm Bureau amici have a direct interest in the outcome of this case. Their farmer and rancher members own or lease significant amounts of property, on which they depend for their livelihoods and upon which all Americans rely for food and other basic necessities. Amici's members' use and enjoyment of their land has often been restricted by application of the Endangered Species Act ("ESA" or "Act"). The decision below denies amici and their members the right to bring judicial challenges to such restrictions, even where an agency flagrantly violates express provisions of the ESA. In consequence, amici have a strong interest in reversing the Ninth Circuit's ruling that farmers and ranchers who have been harmed by the U.S. Fish and Wildlife Service's ("FWS"'s) perverse application of the ESA have no standing to bring a judicial challenge.

We believe that amici's experience in litigating ESA issues will be helpful to this Court in reaching a decision. For example, the AFBF and Idaho Farm Bureaus have

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* The consents of the parties to the filing of this amicus brief are on file with the Clerk.

[1] Texas Farm Bureau has additionally endorsed the *amicus curiae* brief in support of petitioner filed by the State of Texas in this case.

recently appealed to the Ninth Circuit a decision by a district court in Idaho that—based on the Ninth Circuit's ruling in this case—denied them standing to challenge the government's listing of five species of Snake River snails as endangered or threatened. See *Idaho Farm Bureau Fed'n* v. *Babbitt*, 900 F. Supp. 1349, 1360 (D. Idaho 1995) ("*Five Snails Case*").

In the *Five Snails Case*, the Farm Bureau plaintiffs allege that FWS failed to follow procedures and apply standards mandated by the ESA, including the requirement that FWS use the "best scientific and commercial data available" in making a listing decision. 16 U.S.C. § 1533(b)(2). As a result, plaintiffs contend, they were denied access to river waters for recreational and agricultural use and restricted in the type of agricultural practices they could employ. The district court, relying heavily on the Court of Appeals' opinion in this case, held that the plaintiffs lacked standing because their injuries did not fall within the zone of interests of the ESA. 900 F. Supp. at 1360.

On appeal in the *Five Snails Case*, the Farm Bureau plaintiffs argue that the zone of interests test does not apply to their situation because they were directly regulated by the ESA and the FWS's listings. In the alternative, plaintiffs contend that even if the zone of interests test does apply, they satisfied its requirements by showing that they had been and would continue to be indirectly regulated by the snail listings. The *Five Snails Case* illustrates one common and concrete way in which the ESA harms farmers and ranchers. If standing is denied them in such cases on the basis of *Bennett*, Farm Bureau members will be denied any significant avenue of relief against regulatory excesses in the ESA listing process.

ARGUMENT

Amici agree with Petitioners that the zone of interests test is not applicable where Congress has expressly made

standing coterminous with the reach of Article III by enacting a broad citizen suit provision like that in the ESA, 16 U.S.C. § 1540(g)(1). Our purpose in this brief, however, is to show that *if* the Court finds the zone of interests test applicable to this proceeding, the text, structure, and purposes of the ESA, as well as this Court's precedents, mandate that farmers and ranchers injured by government failure to adhere to the ESA's procedures and standards are within the ESA's zone of interests and have standing to seek redress.

I. FARMERS AND RANCHERS ARE WELL WITHIN THE ZONE OF INTERESTS OF THE ESA

The Court of Appeals banished farmers and ranchers from the zone of interests of the Endangered Species Act. But this Court has held that persons have standing to challenge government action that has caused them injury, provided there is a "plausible relationship" between the injured party's interests and the policies incorporated in "the overall context" of the statute at issue. *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 401-403 (1987). The policies embodied in the ESA require government agencies both to protect endangered species and, in the course of doing so, to weigh the impact of species-protection measures on private landowners. Thus, the relationship between the interests of the plaintiffs in this case and the purposes of the ESA is more than the "plausible" link demanded in *Clarke*; the plaintiffs *must* have their day in court if the balancing process contemplated by the ESA is to take place at all.

A. Farmers And Ranchers Are Regulated By The ESA And Hence Are Within Its Zone Of Interests

It is well-established that injured persons who are "'regulated by the statute * * * in question'" are within its zone of interests. *Association of Data Processing Serv. Orgs.* v. *Camp*, 397 U.S. 150, 153 (1970) ("*ADAPSO*"). Farmers and ranchers typically satisfy this test. No one, for example, is more heavily impacted by FWS's disregard for the

standards imposed by the ESA in the preparation of biological opinions than the rancher plaintiffs in this case. Plaintiffs will have less water available for irrigation and recreation, which will determine how they can use their land. Though this form of regulation may be indirect, it is regulation nonetheless. It ignores the realities of the situation to maintain, as did the Court of Appeals (63 F.3d at 917 n.2), that the government's actions here regulate only itself and not the plaintiff ranchers.

Another example of how the ESA regulates farmers and ranchers is the "take" prohibitions of the Act. Once a species is listed, these prohibitions apply automatically. They often limit or prevent the most routine agricultural activities, from clearing land to plowing fields. See *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 115 S. Ct. 2407 (1995). It is pure fiction to pretend that listing decisions do not regulate the conduct of farmers and ranchers. See *Five Snails Case*, *supra*.

Farmers and ranchers are impacted by the ESA so immediately and to such a great extent that they are effectively regulated by the statute and are obviously within its zone of interests. But even if this were not the case, there can be no doubt that Congress envisioned that procedural constraints on FWS would benefit landowners and intended that they have standing to enforce those limits. Farmers' and ranchers' activities would fall outside the ESA's zone of interests only if their interests were so "marginally related" to the statutory scheme that Congress reasonably could not have intended to permit them to enforce the relevant provisions of the Act. *Clarke*, 479 U.S. at 399. This test for standing is not "especially demanding"; in fact, there need

be "no indication of congressional purpose to benefit the would-be plaintiff" at all. *Id.* at 399-400.[2]

B. The ESA Provides Procedural Protections Against Needless Economic Harm To Private Landowners

Congress sought to protect property owners against unreasonable and overbroad regulation under the ESA by requiring responsible agencies to factor the economic impact of species-protection proposals into their decision-making.

The ESA requires that any action taken by government agencies to protect endangered species be "reasonable and prudent" (16 U.S.C. § 1536(b)(3)(A)), that agencies "tak[e] into consideration the economic impact" of their action in a balancing process that weighs the respective benefits of acting or not acting (§ 1533(b)(2)), and that they rely on the "best scientific and commercial data available" (§ 1536(a)(2)). The natural and ordinary meaning of these provisions is that Congress intended that ESA enforcement should be as aggressive as necessary to prevent species

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[2] Even if the rancher plaintiffs were not subject to ESA regulation, they should have standing as economic competitors of the endangered fish and their champions. Indeed, the Court of Appeals justified its denial of standing based on the plaintiffs' "competing interest" with the suckers. 63 F.3d at 921. This Court often has granted standing to the economic competitors of regulated parties. *E.g.*, *Clarke*, 479 U.S. at 409 (trade association representing securities entities had standing under statute regulating banks); *Air Courier Conf.* v. *APWU*, 498 U.S. 517, 529 (1991) ("competitors of regulated entities have standing to challenge regulations"); see also *ADAPSO*, 397 U.S. at 156; *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45, 46 (1970); *Investment Co. Inst.* v. *Camp*, 401 U.S. 617, 620-621 (1971).

extinction but not more so, and that enforcing agencies should minimize any detrimental economic impact of species protection on property owners. In determining whether the zone of interests test is satisfied, courts properly consider the "overall purposes" of the statute in question and are not limited to consideration of any particular statutory section. *Clarke*, 479 U.S. at 401. Although the "economic impact" consideration is required specifically for designations of critical habitat (§ 1533(b)(2)), it reaches more widely and clearly reflects one of the "overall purposes" of the ESA.

For one example, it is impossible to conceive how an agency decision can satisfy the § 1536(b)(3)(A) requirement that it be "reasonable and prudent" if that decision was reached without taking into account its likely economic impact. Economic consequences *always* inform a reasonable and prudent decision. For another, the statute specifically requires "consideration of the economic impact of * * * designating critical habitat" (124 Cong. Rec. 38134 (1978) (Statement of Rep. Leggett)), including "revisions" to and "exclusion[s]" from habitat designation. § 1533(b)(2). Properly interpreted, the ESA demands that economic interests be taken into account at every stage of the species protection process.

Other provisions of the ESA likewise indicate a congressional purpose to require that agencies balance the interests of landowners, broadly conceived, against the goal of species protection. For example, the Act's requirement that an agency conduct a hearing on a listing proposal, if requested (§ 1533(b)(5)(E)), creates a forum in which competing interests can be aired. But farmers' and ranchers' ability to demand a hearing and make statements on a listing proposal would be meaningless if they were denied standing to challenge the agency's unreasoned and arbitrary rejection of their views. Other provisions too—such as notice and comment requirements more demanding than those imposed by the Administrative Procedure Act—would be otiose if

Congress' *sole* concern were to protect endangered species; they show that a more balanced approach was intended.[3]

Plaintiffs allege that in preparing its biological opinion on how to protect two endangered species of suckers, FWS failed accurately to assess and balance the competing interests at stake. As a result, FWS developed an unreasonable and imprudent plan to save the fish, requiring substantially higher-than-necessary water levels in the Klamath reservoirs and thereby inflicting substantial harm on local property owners like plaintiffs who depend on that water for irrigation and other purposes. Because the solution proposed by FWS and adopted by the Bureau of Reclamation goes far beyond what was necessary to save the fish, plaintiffs allege, respondents acted unlawfully and should be restrained.

The ESA contemplates the possibility that agencies will adopt overbroad species protection measures of the type alleged by plaintiffs. The Act incorporates standards to guard against this overreaching. Plaintiffs allege a violation of those standards and seek to restore agency consideration of the full array of interests contemplated by Congress. The Court of Appeals would bar them from doing so.

That Congress did not specifically identify farmers and ranchers as beneficiaries of the ESA is of no moment. This Court in *Clarke* recognized that classes of persons not specifically mentioned in a statute nevertheless often fall within its zone of interests and have standing. 479 U.S. at 395-396 & n.10 (citing *ADAPSO*, 397 U.S. 150, and *Arnold*

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[3] For all these reasons, amici urge this Court to reconsider its dictum in *Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153, 184 (1978), that Congress intended to authorize species-protection measures "whatever the cost." It is very doubtful, given the plain language and structure of the statute, that *any* agency decision concerning species protection may be made without first employing cost-benefit analysis.

Tours, Inc. v. *Camp*, 400 U.S. 45 (1970)). Here, concern for the interests of farmers and ranchers—parties whose interests are inevitably and obviously affected by the ESA restrictions—is "[i]mplicit in the statutory provisions," and thus their very concrete and substantial injuries fall within the statute's "zone of interests." *Barlow* v. *Collins*, 397 U.S. 159, 164 (1970); see also *Sweet Home*, 115 S. Ct. at 2410 (assuming without discussion that landowners and logging companies had standing to challenge regulations promulgated under the ESA).

The Congressional mandate that agencies identify and weigh economic and other interests when considering species-protection measures is both eminently reasonable and completely consistent with contemporary thinking regarding the interrelated issues of protecting the environment and promoting agricultural production. Farmers and ranchers are central players in the ecosystem that the ESA seeks to protect. They have long prided themselves on being stewards of the land. Indeed, it is through their dedication to scientific conservation methods and willingness to develop and embrace new technology that the United States is able to produce, on about 300 million acres of crop land, food and other essentials that would otherwise require setting aside a billion or more acres for farming. The efforts of the farming and ranching community have thus freed some 700 million acres for other uses, including species conservation.

The FWS itself has recognized that the ESA mandates this mutually reinforcing approach, defining its own responsibility under the ESA as "protecting or restoring the function, structure, and species composition of an ecosystem *while providing for its sustainable socioeconomic use*," and including as its "partners" in that effort "*corporate and individual landowners*." United States Fish & Wildlife Service, *An Ecosystem Approach to Fish and Wildlife Conservation* (1995) (emphasis added). By requiring that the government's species protection efforts be "reasonable and prudent" and take account of "economic impact[s]," the ESA contemplates a lasting and healthy relationship between the humans and animals who share the land—not the single-minded pursuit of species protection at any cost.

Agency regulation that fails to take full account of economic and other consequences upsets the balanced relationship between agricultural production and species protection, and thus runs afoul of this broad statutory purpose. Justice O'Connor, concurring in *Sweet Home*, recognized that FWS, in the course of enforcing the ESA, might well engage in just such "questionable applications" of its regulations. 115 S. Ct. at 2421. Plaintiffs' suit—claiming that the government swept aside the balancing of landowners' and species protection interests required by the ESA in the interagency consultation process—*strengthens* the species protection program enacted by Congress by inviting judicial correction of "questionable applications." The decision below deprives plaintiffs of the ability to enforce the very part of the Act designed to protect their interests.

C. Farmers And Ranchers Must Have Standing If The ESA's Procedural Limits Are To Be Enforced

It would make no sense to impose a requirement that species protection be "reasonable and prudent" (16 U.S.C. § 1536(b)(3)(A)) if no one had standing to challenge unreasonable and imprudent agency action. By denying the plaintiffs standing in this case, the Court of Appeals effectively removed overregulation by the challenged agencies from *any* judicial oversight. Such an extreme position not only defies common sense, but also conflicts with the well-established principle that injury resulting from a regulatory agency's failure to abide by required procedures is more than sufficient to confer standing. *E.g.*, *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 103-104 (1979) (complainants had standing where they were "dissatisfied with the * * * delays" resulting from HUD's procedural irregularities).

Because farmers and ranchers are regulated and economically impacted by the ESA, and because their property houses so many listed species, farmers and ranchers are "reasonable candidates" (*Clarke*, 479 U.S. at 403) to serve as "reliable private attorney[s] general" (*ADAPSO*, 397 U.S. at 154) to monitor the government's compliance with the Act. In many instances, they may be the *only* class of interested parties with the incentive and information necessary to play such a watchdog role. See *Five Snails Case*, *infra* pp. 14-15. Thus, if farmers and ranchers do not have standing to challenge the government's overregulation, it is unlikely that anyone does, and there will exist no judicial safeguard against a government run amok.

It is essential, then, if FWS and other agencies are to be constrained within statutory limits, that economically affected persons like plaintiffs be accorded standing. See also *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940) (granting standing under the Communication Act of 1934 to the only class of persons likely to have "a sufficient interest to bring to the attention of the appellate court errors of law" by the FCC); *Schering Corp.* v. *FDA*, 51 F.3d 390, 396 (3d Cir. 1995) (pioneer drug manufacturers are "well-positioned" to monitor the FDA regulations at issue because they possess the scientific data "to recognize when the FDA may stray from the legislatively mandated testing requirements"). Otherwise, those statutory limits effectively will be unenforceable.

D. The Court Of Appeals' Motivation Test For Standing Would Abrogate An Important Check On Governmental Misconduct

The Court of Appeals would limit standing under the ESA to plaintiffs with the "correct" motivation. Only those purporting to be motivated by "an interest in the preservation of endangered species" (63 F.3d at 919) would be permitted to challenge governmental misconduct in enforcing the Act. The court below thereby effectively transformed the zone of

interests test from an objective check for a minimal nexus between a plaintiff's interest and the statutory scheme into a subjective inquiry into the plaintiff's motivation.

As one federal district court correctly reasoned in a recent case presenting a similar challenge to standing under the ESA, to deny standing to plaintiffs motivated by their own economic well-being rather than species protection would leave FWS "unrestrained" so long as it "cloaks any of its acts in the laudable robe of endangered and threatened species protection." *Mausolf* v. *Babbitt*, 913 F. Supp. 1334, 1342 (D. Minn. 1996). And such a blanket exemption from procedural regularity, the court continued, would be "a form of totalitarian virtue [and] foreign to the rule of law." *Ibid.* (holding that snowmobilers had standing to challenge National Park Service's closure of national park areas without following proper notice and comment procedures because "interests other than those asserted on behalf of endangered species also fall within the zone of interests protected by the ESA").

Yet, that is precisely the Court of Appeals' "Catch-22" holding in this case: if the government's regulatory zeal leads it to overstep the constraints imposed upon it by the ESA, the *only* parties able to challenge the government's misconduct would be those with *no* incentive to do so. As a practical matter, *no one* would enforce these important statutory protections. Congress could not have intended such a bizarre result.

To illustrate the implications of the Court of Appeals' rule, suppose that federal agencies closed Grand Canyon or Yellowstone Park on the ground that human visitors threatened the survival of a listed rodent, and did so without following the ESA's required procedures. According to the court below, the affected tourists would have no standing to sue because their interests would be opposed to those promoted by the ESA. Likewise, the ruling below would routinely deny standing to farmers whose livelihoods are

directly and significantly impacted by a regulation designed to protect a listed species, such as the farmer who is told he may not bring an area of land into productive use because it harbors a listed mole, or who may not protect livestock from the ravages of a protected predator. Cf. *Christy* v. *Lujan*, 490 U.S. 1114, 1115-1116 (1989) (White, J., dissenting).

These hypotheticals may seem far-fetched. But at oral argument in *Mausolf*, counsel for the federal government urged that "there is absolutely no judicial recourse for persons who contend the FWS acts overzealously on behalf of listed species." 913 F. Supp. at 1342 n.13. And, in response to a hypothetical posed by the court (with reference to the national park at issue), the government "asserted that the FWS could *close the entire park to human access* to minimize the possibility of any incidental takes of protected species." *Ibid.* (emphasis added). As the court summed up the government's "remarkable position," such an action would be "immune from challenge, and entirely beyond review, because it benefits, rather than harms, endangered or threatened species." *Ibid.* Congress could not have intended that government regulation roam so unchecked.

To avert such a radical unleashing of governmental power, the zone of interests test for standing has not been—and should not be—treated as a motivation test, as the Court of Appeals would have it. Courts are ill-suited to engage in such an inquiry. A motivation test for standing, moreover, would prevent courts from hearing the variety of positions that the ESA clearly contemplates is to be considered as disputes arise over species protection. It would result in a skewed federal environmental policy reflecting the positions of only certain favored groups espousing only one set of the interests incorporated into the ESA's statutory scheme. See generally Ring & Behrend, *Using Plaintiff Motivation to Limit Standing: An Inappropriate Attempt to Short-Circuit Environmental Citizen Suits*, 8 J. Envtl. L. & Litig. 345, 355 (1994).

E. The Decision Below Was A Premature And Partisan Ruling On The Merits

The Court of Appeals' ruling was, in effect, a premature resolution of the merits of plaintiffs' claims. Standing is a threshold question, not a stand-in for resolution on the merits. But, as one commentator has pointed out, "[c]anvassing the entire statute and legislative background for indicia of protective intent necessarily involve[s] a preliminary examination of the merits and a forecast of the strength of the claims." Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 Yale L.J. 425, 494-495 (1974). Here, plaintiffs' allegation was that FWS failed to prepare its biological opinion in conformity with the ESA's requirements. By denying standing to plaintiffs—the only persons with sufficient injury and incentive to bring a judicial challenge—and thereby totally immunizing FWS's conduct from judicial review, the Court of Appeals effectively ruled that FWS did no wrong (indeed, that it never can do wrong when it extends species protection). Such a ruling was premature because, as this Court explained in *Investment Co.*, so long as Congress "arguably" legislated against the challenged conduct, whether Congress actually did so is "a question for the merits." 401 U.S. at 620. Especially given the procedural posture of this case—a motion to dismiss prior to any discovery—the Court of Appeals should not have short-circuited plaintiffs' opportunity to support their allegations.

The problem is not simply one of timing, but of basic fairness. The Court of Appeals' version of the zone of interests test would transform courts from neutral adjudicators into partisans favoring only one side in environmental adjudication. The absurd implications of reserving standing only for proponents of a certain course of action—in this case only for those asserting a "community of interest [with] the suckers" (63 F.3d at 921)—may be demonstrated with an illustration. Suppose Congress were to pass a statute prohibit-

ing alteration of any building determined to be "a historical treasure." Overzealous regulators ban alteration of homes built before 1960, preventing a homeowner from pursuing a badly needed renovation. Because the homeowner has interests at odds with historic preservation, he or she would not have standing to challenge the ban. A court thus would uphold the overregulation without ever hearing substantive arguments against it.

This Court never intended its zone of interests test—a mere "gloss on the meaning of [APA] § 702" (*Clarke*, 479 U.S. at 400 n.16)—to be wielded as a sword in this manner, vanquishing enemies of whatever point of view a court adopts as politically proper. This Court should restore the zone of interests test to its properly neutral and objective role—helping to ensure that those whose interests Congress required to be considered are granted standing to sue an agency that has ignored that mandate.

F. The Impact Of The Decision Below Extends Well Beyond The ESA Provisions At Issue Here

The Ninth Circuit's niggardly approach to ESA standing is not restricted to the species-*protection* sections of the ESA at issue in this case. A federal district court in Idaho already has relied on the ruling below to deny standing to farmers and ranchers challenging species-*listing* decisions by FWS. See *Five Snails Case*, 900 F. Supp. at 1360. The Court of Appeals' rule would quash *all* efforts to constrain ESA enforcement within the confines of the statute.

In the *Five Snails Case*, farmers and ranchers sued to enjoin the FWS's listing of five species of Snake River mollusks as endangered or threatened. The Plaintiffs alleged that the listings threatened both the continued viability of their agricultural operations by denying them use of river waters and their recreational enjoyment of the mollusk habitat. They maintained that in reaching its decisions, FWS ignored procedures and failed to apply standards required by

the ESA. The district court, relying heavily on the *Bennett* opinion, denied the plaintiffs standing because their injuries did not fall within the zone of interests of the ESA. 900 F. Supp. at 1360.

Thus, the distorted and cramped vision of standing advocated by the Court of Appeals already has been extended by one court and is certain, if upheld, to annul the right of injured parties to challenge governmental improprieties in many additional areas of environmental regulation. A proper understanding of the zone of interests test should be restored before the damage done to individual landowners becomes irreparable.

II. THE COURT OF APPEALS' DENIAL OF STANDING VIOLATES SEPARATION OF POWERS

So long as it stays within the limits of Article III, Congress, as the author of the ESA, has the authority to determine ESA standing requirements. See *ADAPSO*, 397 U.S. at 154 ("Congress can, of course, resolve the question one way or another, save as the requirements of Article III dictate otherwise"). Thus, whether plaintiffs have standing to bring this litigation "turns on congressional intent, and all indicators helpful in discerning that intent must be weighed." *Clarke*, 479 U.S. at 400. See also Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 885 (1983) (standing "is largely within the control of Congress").

In enacting the ESA, Congress left no doubt about its intent. Perhaps foreseeing efforts to challenge the standing of private landowners to bring ESA actions, Congress took care to inscribe in the statute the broadest possible standing provision:

> "[A]ny person may commence a civil suit on his own behalf * * * to enjoin any person, including the United States and any other governmental instrumentality or agency * * * who is alleged to

> be in violation of any provision of this chapter or regulation issued under the authority thereof."

16 U.S.C. § 1540(g)(1)(A). That provision proceeds specifically to authorize "any person" to do exactly what plaintiffs in this case did—sue "the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary." *Id.* § 1540(g)(1)(C). As one commentator explained with regard to such "citizen suit" provisions, they are designed to permit a broad array of parties to "question the procedural regularity" of agency action. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. Pa. L. Rev. 1033, 1044 (1968). That precisely characterizes both Congress' purpose in enacting § 1540 and plaintiffs' allegations in this litigation.

Congress thus has spoken on the issue of plaintiffs' standing. A broad citizen suit provision like that in the ESA represents Congress' charge to courts to be inclusive in the diversity and breadth of interests accorded the right to challenge governmental misconduct. See *Gladstone*, 441 U.S. at 103-104 (a citizen suit provision of the Fair Housing Act "contains no particular statutory restrictions on potential plaintiffs"); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 16-17 (1981) (the citizen suit provision in the Federal Water Pollution Control Act "was intended by Congress to allow suits by [a] broad category of potential plaintiffs"); *Swan View Coalition, Inc.* v. *Turner*, 824 F. Supp. 923, 928-929 (D. Mont. 1992) (based on the citizen suit provision of the ESA, challengers to the adequacy of a biological opinion prepared by FWS had standing to sue). What Congress has granted, the judiciary may not, without violating separation of powers, take away. The Court of Appeals further violated the principle of separation of powers by slighting Congress' mandate that FWS balance the economic costs and benefits of its species-protection decisions. As Professor Sunstein has commented,

"[a]gency rejection of congressional enactments" that mandate "cost-benefit balancing" is "inconsistent with the system of separation of powers." Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 217-218 (1992).

This separation-of-powers principle underlying the law of standing "prevent[s] the anti-majoritarian federal judiciary from usurping the policy-making functions of the popularly elected branches." Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 222 (1988). The Ninth Circuit panel in this case clearly disagreed with Congress' resolve to grant standing broadly to persons injured by enforcement of the ESA. But such policy determinations, under our system, are the province of the legislature. The Court of Appeals impermissibly overstepped its proper bounds by using a narrowly conceived and hopelessly biased zone-of-interests requirement to thwart Congress' purpose to ensure that affected citizens could serve as a check on excessive regulation in the name of species protection. By reversing the Court of Appeals' unwarranted exercise of judicial power, this Court will give effect to Congress' intent and to the separation of powers embodied in our Constitutional structure.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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